Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-21-142 OF 1995
KAMALANATHAN RATNAM J
1 APRIL 1999

Administrative Law *— Rights and liabilities of public servants — Termination — Termination after preventive detention — Whether compliance with General Orders 34 and 35 — Whether detention order signed by Deputy Minister for Home Affairs was valid — Whether reasons for dismissal compulsory — Public Officers (Conduct and Discipline) (Cap D) General Orders 1980*

The plaintiff was suspended from his duties on the ground that he had been detained under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The suspension was pursuant to General Order 34(2) of the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980. The plaintiff was subsequently dismissed from service. The plaintiff contended that the purported dismissal was illegal and unlawful as it was made pursuant to a suspension which was itself illegal and unlawful. The suspension was said to be unlawful because the detention order upon which it was based was illegal and unlawful in that: (i) the Deputy Minister for Home Affairs acted in excess of his power in making the detention order because, whilst the Minister of Home Affairs was satisfied that the detention order ought to be made against the plaintiff, the order was however signed by the Deputy Minister for Home Affairs; and (ii) no reasons were given for his dismissal and that no opportunity was given to make a plea in mitigation before he was dismissed. The plaintiff thus prayed for a declaration that his dismissal from service was null and void. It was noted that the plaintiff had filed an application for a writ of habeas corpus to seek a declaration that the order of detention was null and void but, since the plaintiff was already released, the application was therefore struck out.

Held, dismissing the application:

(1) The defendants had followed the rules and procedure as set out in General Orders 34 and 35 and had not committed any error of law. The court was unable to accept the contention that the detention order was void (see p 684 G–I).

(2) The plaintiff ought to have proceeded with alacrity to have his application heard before his release. He ought to have raised the validity of the Deputy Minister's signature to the detention order at that forum. In any event, the plaintiff had not pleaded for a prayer to declare the detention order invalid. On the issue of failure to plead too, the plaintiff must fail (see p 685 E–I).

(3) In so far as the giving of reasons is concerned, so long as the General Orders concerned do not require the defendants to provide reasons, there is no requirement for them to do so

A (see p 686E–F); *Minister of Human Resources & Ors v National Union of Hotel Bar and Restaurant Workers* [1997] MLJ 377 followed

(4) Since the plaintiff was detained on 5 August 1991, the limitation period would thus expire on 4 August 1994. Since the originating summons was filed on 25 November 1995, the limitation under B s 2(a) of the Public Authorities Protection Act 1948 had set in (see p 686G–H); *Sr Katherine Lim KH v Ketua Pengarah Perkhidmatan Perubatan Malaysia* [1997] 2 MLJ 538 followed.

C **[Bahasa Malaysia summary**

Plaintif telah digantung kerja atas alasan penahanannya di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969. Pergantungan tersebut adalah menurut Perintah Am 34(2) di bawah Perintah Am Pegawai-Pegawai Awam (Kelakuan dan Disiplin) (Bab D). Plaintif kemudiannya telah D diberhentikan kerja. Plaintif telah menegaskan bahawa pemberhentian kerjanya adalah menyalahi undang-undang oleh kerana ia dibuat berikutan perintah pergantungan yang menyalahi undang-undang. Penggantungan tersebut adalah dikatakan sebagai menyalahi undang-undang oleh kerana: (i) Timbalan Menteri Hal-Ehwal Dalam Negeri telah bertindak di luar kuasanya dalam E membuat perintah penahanan kerana sementara Menteri Hal-Ehwal Dalam Negeri telah berpuas hati bahawa perintah penahanan patut dibuat terhadap plaintif, tetapi perintah tersebut telah ditandatangani oleh Timbalan Menteri Hal Ehwal dalam Negeri; dan (ii) tiada sebab-sebab telah diberikan untuk pemberhentian kerjanya dan tiada F peluang telah diberikan untuk meringankan hukuman sebelum beliau telah diberhentikan kerja. Plaintif memohon untuk suatu deklarasi bahawa pemberhentian kerjanya adalah tidak sah dan batal. Adalah diperhatikan bahawa plaintif telah memfailkan suatu writ habeas corpus untuk meminta suatu deklarasi bahawa perintah penahanannya adalah tidak sah dan batal, tetapi oleh kerana plaintif G telah pun dilepaskan, permohonan tersebut telah diketepikan.

Diputuskan, menolak permohonan tersebut:

(1) Defendan-defendan telah mengikuti peraturan-peraturan dan prosedur seperti yang dibentangkan di dalam Perintah Am 34 dan 35 dan tidak melakukan sebarang kesilapan undang-undang. H Maka, mahkamah tidak dapat menerima hujahan bahawa perintah penahanan adalah tidak sah (lihat ms 684G–I).

(2) Plaintif patut memulakan dengan segera agar permohonannya didengar sebelum beliau dilepaskan. Beliau patut membangkitkan kesahan tandatangan Timbalan Menteri kepada perintah I penahanan di dalam forum tersebut. Walau apa sekalipun, plaintif tidak memplid dalam permohonannya untuk mengisytiharkan penahanan tersebut sebagai tidak sah. Mengenai isu kegagalan

untuk memplid, plaintif mestilah gagal (lihat ms 685E–I).

(3) Berkenaan dengan pemberian sebab-sebab, selagi Perintah-Perintah Am tidak memerlukan defendan-defendan untuk memberikan sebab-sebab, tidak terdapat keperluan bagi mereka untuk berbuat demikian (lihat ms 686E–F); *Minister of Human Resources & Ors v National Union of Hotel Bar and Restaurant Workers* [1997] MLJ 377 diikut.

(4) Oleh kerana plaintif ditahan pada 5 Ogos 1991, tempoh had masa akan luput pada 4 Ogos 1994. Oleh kerana saman pemula telah difailkan pada 25 November 1995, had masa di bawah s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 telah pun luput (lihat ms 686 G–H); *Sr Katherine Lim KH v Ketua Pengarah Perkhidmatan Perubatan Malaysia* diikut.]

Notes

For cases on termination of public servants, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 554–556.

Cases referred to

A Subramaniam v SMRM Muthiah Chetty [1934] 3 FMSR 222 (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114 (refd)

Minister of Human Resources & Ors v National Union of Hotel, Bar and Retaurant Workers, Semenanjung Malaysia and another appeal [1997] 3 MLJ 377 (folld)

Mohd Yusof Mohamad v Kerajaan Malaysia & Anor [1999] 5 CLJ 386 (refd)

Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153 (refd)

Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd)

R Rama Chandran v The Industrial Court Malaysia Anor [1997] 2 MLJ 145 (refd)

Sr Katherine Lim KH v Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors [1997] 2 MLJ 538 (folld)

Sukumaran s/o Sundram v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia [1995] 2 MLJ 247 (refd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)

Public Authorities Protection Act 1948

Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 GO 34(2), 36(1)

Public Order and Prevention of Crime (Procedure) Rules 1972 r 3(2)

Karpal Singh (*M Manoharan* with him) for the plaintiff.

Ahmad Kamal Mohd Shahid (from the Attorney General Deparment) for the defendants.

Kamalanathan Ratnam J:

Facts

The plaintiff was at all material times in the employment of the second defendant as a driver. The first defendant was the appropriate disciplinary authority relating to the plaintiff and was at all material times acting as the agent of the second defendant.

By a letter dated 30 August 1991 the plaintiff was informed by the Pengerusi, Lembaga Tatatertib Perkhidmatan Awam Bagi Pegawai-Pegawai Kumpulan D, Jabatan Peguam Negara, Malaysia, that he was suspended from his duties with effect from 5 August 1991 on the ground that he had been detained under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The suspension was pursuant to General Order 34(2) of the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980. By a letter dated 16 July 1992 the plaintiff was dismissed from service with effect from 6 July 1992. By a letter dated 26 July 1992 the plaintiff appealed to the Lembaga Rayuan Tatatertib. By a letter dated 26 November 1992 the plaintiff was informed that on 19 October 1992 his appeal was dismissed.

Case for the plaintiff

The plaintiff contended that his suspension was unlawful as the detention order upon which it was based was illegal and unlawful and not pursuant to a valid or legal power in that:

(1) the Timbalan Menteri Dalam Negeri acted in excess of his power in making the said detention order;

(2) the plaintiff was served only one Form 1 within the meaning of r 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 to make representation to the Advisory Board; and

(3) no reasons were given for his dismissal, and that no opportunity was given to make a plea in mitigation before he was dismissed.

The plaintiff contended that the purported dismissal was illegal and unlawful as it was made pursuant to a suspension which was itself illegal and unlawful. He argued that he was not given the grounds or reasons upon which he was dismissed thereby not giving him an effective opportunity to pursue a meaningful appeal to the Lembaga Rayuan Tatatertib. The plaintiff also contended that the Lembaga Rayuan Tatatertib itself did not give any reasons for dismissing his appeal to it, thereby infringing the rules of natural justice and rendering its decision null and void and of no effect.

The claim

The plaintiff thus prayed for:

(1) A declaration that his dismissal from service pursuant to the letter dated 26 November 1992 from the first defendant is null and void and of no effect and that he is still a member of the public service.

(2) An enquiry to be held to determine the salaries, emoluments and other benefits due to him with a view that the same be paid by the defendants to the plaintiff.

(3) Damages.

(4) Interest on the adjudged sum at such rates and for such periods as this court deems fit.

(5) Costs.

Case for the defence

The defendants contended that the plaintiff was dismissed pursuant to General Order ('GO') 36(1) of the Public Officers (Conduct and Discipline)(Chapter D) General Orders 1980. The defendants also argued that the plaintiff's claim was caught by time bar pursuant to the Public Authorities Protection Act 1948 ('the PAPA'). The defendants also contended that all actions taken by them were within the law.

By consent parties agreed not to adduce any evidence but to rely on the agreed and admitted documents as contained in the common agreed bundle of documents marked CABD. Parties also agreed to rely on oral submissions.

Findings of the court

Is the disimissal null and void?

It is appropriate to reproduce GOs 34, 35 and 36.

General Order 34 reads as follows:

(1) Where there has been made against an officer an order of detention, supervision, restricted residence, banishment or deportation, or where there has been an order imposing upon such officer any form of restriction or supervision by bond or otherwise under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration or protection of women and girls, the Head of Department shall apply for a copy of the order from the appropriate authority and upon receipt thereof, shall submit a report together with full particulars of the officer's past record of service to the Appropriate Disciplinary Authority and the Head of Department shall recommend to the Disciplinary Authority whether the officer should be dismissed from the service, reduced in rank or otherwise dealt with depending on the degree of disrepute which the officer brings to the service.

(2) Upon receipt of the report from the Head of Department, the Appropriate Disciplinary Authority shall forthwith suspend the officer from the exercise of his duties.

General Order 35 reads as follows:

(1) Notwithstanding anything in General Order 23, if after considering the report and documents submitted by the Head of Department in General Orders 33 and 34(1), the Appropriate Disciplinary Authority is of the opinion that the officer merits dismissal or reduction in rank, it may

forthwith direct accordingly; or if it is of the opinion that the officer should be inflicted with a lesser punishment or otherwise dealt with, the Disciplinary Authority may forthwith inflict upon the officer such lesser punishment or deal with him in such manner as it may deem fit.

(2) If as a result of the lesser punishment the officer is not dismissed, the question of his emoluments during the period of his suspension shall be at the discretion of the Director General of Public Services.

General Order 36 reads as follows:

A Disciplinary Authority may impose on an officer any one or any combination of two or more of the following punishments:

(a) warning;
(b) reprimand;
(c) fine;
(d) forfeiture of salary;
(e) stoppage of increment;
(f) deferment of increment;
(g) reduction of salary;
(h) reduction in rank;
(i) dismissal.

Mr Karpal Singh for the plaintiff argued that the decision making process from the time of suspension was fatally flawed and thus the consequential dismissal must automatically be held void. He referred me to the detention order dated 5 August 1991 put in by consent into the CABD. The said order stated that whilst the Minister of Home Affairs was satisfied that the said detention order ought to be made against the plaintiff and whilst naming and identifying the plaintiff by expressly stating his identity card number, the said detention order was however signed by the Deputy Minister for Home Affairs. This Mr Karpal Singh argued was fatal. It must be noted that at the material time the Minister for Home Affairs was also the Prime Minister whereas the then Deputy Minister for Home Affairs was Dato' Megat Junid bin Megat Ayob. The grounds for detention under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 were that he was a thug and it listed six instances of extortion and assault. The notice stating the grounds of detention based on six reasons was signed by the Assistant Secretary to the Ministry of Home Affairs upon the order of the Minister of Home Affairs. In support of his argument that the signing of the detention order by the Deputy Minister was fatal when it was the Minister himself who was satisfied that the plaintiff needed to be detained, the plaintiff relied on *Sukumaran s/o Sundram v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia* [1995] 2 MLJ 247. In that case the High Court had held that although the Deputy Minister has the same power as the Minister under art 43A(2) of the Federal Constitution, the Deputy Minister must not act in part in exercising the power of detention under s 4(1) of the Ordinance. The court held that the Deputy Minister did not know the state of mind of the Minister and had acted mechanically in signing the detention orders. He was not empowered to sign the detention orders when he himself did not apply his mind to

which limb of s 4(1) of the Ordinance he was acting under. The court went on to hold that since the power to detain a person without trial must be expressed clearly and unequivocally, a detention therefore cannot be exercised by sheer inference. Thus one could not infer that the Deputy Minister was personally satisfied that the first limb of s 4(1) was breached before signing the order. This was also a case where the Home Minister was satisfied that Sukumaran s/o Sundram ought to be detained whereas the said order was signed by the same Deputy Minister, as in the case before me. I was urged to adopt the reasoning in *Sukumaran.*

In arguing against this submission Encik Kamal for the defendants contended that in judicial review cases this court must confine itself to the decision making process and not to the decision itself.

In *Mohd Yusof Mohamad v Kerajaan Malaysia & Anor* [1999] 5 CLJ 386, I had declined to follow the decision in *R Rama Chandran v The Industrial Court Malaysia Anor* [1997] 2 MLJ 145. I said at p 391:

> ... A decision made in respect of an Industrial Court matter and a decision requiring the dismissal of a public servant call for different approaches by the High Court when called upon to review the said decision. In any case I am of the view that the decision in *Ekambaran* does not support the view as expressed by the plaintiff that in reviewing cases of dismissal by administrative tribunals, the court can look into the merits of the decision. In that case the learned trial judge had allowed the application for certiorari and quashed the order for dismissal on two grounds:
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> (a) that the tribunal was in breach of the audi alteram partem rule; and
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> (b) that there was a procedural defect by way of an infringement of the rule of natural justice.

It was only in respect of the sentence that the trial judge had applied the decision in *Rama Chandran.* But this view appears clearly to be in conflict with the decision of the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153 which held that the High Court does not have the jurisdiction and power to substitute its own view, for the view of the appropriate disciplinary authority, as to the appropriate penalty for the employee's misconduct.

There has been no complaint by the plaintiff in this case before me that the defendants had not complied with GOs 34 and 35. I therefore hold that the disciplinary authority had indeed followed the rules and procedure as set out in GOs 34 and 35 and have not committed any error of law. In fact in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 the then Supreme Court said through Jemuri Serjan CJ (Borneo) at p 130 as follows:

> ... In dealing with Ch D of the 1980 General Orders we remind ourselves that we are dealing with General Orders that have legislative effect and we must guard ourselves against adding words into them which were never intended.

I am unable to accept the submission of Mr Karpal Singh nor am I persuaded by the decision in *Sukumaran* that I ought to hold the detention order void. General Order 34(1) sets out the scope and function of the Head

of Department when he knows of an order of detention against his officer. He should apply for a copy of the said order from the appropriate authority and together with the said report, submit a report together with details of the officer's past record of service to the appropriate disciplinary authority. The Head of Department should also recommend to the said authority whether the said officer should be dismissed from service or he should recommend the appropriate punishment the officer should receive as set out in GO 36.

Since it is the view of the Supreme Court in *Ghazi* that the General Orders have legislative effect, it is not for this court to go beyond what is laid out in the General Orders. If I accept Mr Karpal's view it means that either the Head of Department or the appropriate disciplinary authority also has a duty to look into the detention order to see if it is valid. I do not think that it is the lot of the Head of Department or the Appropriate Disciplinary Authority to do so. It is obvious that the Supreme Court in *Ghazi* had this in mind when it cautioned that 'we must guard ourselves against adding words into them which were never intended.'

I accept the submission of En Kamal that if the plaintiff had intended to challenge the detention order dated 5 August 1991 he should have filed a writ of habeas corpus to seek a declaration that the said order was null and void. With forthright candour Mr Karpal Singh admitted that such an application was indeed filed but that since the plaintiff was already released, the said application was therefore struck out.

I am of the view that the plaintiff ought to have proceeded with alacrity with a certificate of urgency if necessary, to have had his application heard before his release. He ought to have raised the validity of the Deputy Minister's signature to the detention order at that forum and if the decision was in his favour then, to use that decision as a launch-pad for this action. Having let slip his opportunity then, he cannot now seek to challenge the validity through this court.

In a very old yet sustained judgment the then Court of Appeal in *A Subramaniam v SMRM Muthiah Chetty* [1934] 3 FMSR 222 held that a dissatisfied party must take the remedy of appeal if that is open to him, and that if he fails to appeal he must be taken to have acquiesced in the order; otherwise by instituting a declaratory suit it would seem that he is attempting to obtain the same result as he would by appealing but evades the time limit prescribed for the appeal. In the same case the Court of Appeal held that whilst it was obvious that the collector whilst acting within his powers, had made 'a series of blunders in the application of the law', yet by failing to appeal and not taking that remedy the plaintiff must be taken to have acquiesced in the order and that it was too late for him to question the order subsequently by an application for a declaration since time bar has already set in. I accept and adopt this reasoning to the case before me. Further and in any case the plaintiff had not pleaded for a prayer to declare the detention order invalid for whatever it is worth. On this issue of failure to plead too the plaintiff must fail. However, I am of the view that even if this was pleaded I would have rejected the argument for reasons stated earlier.

Since Mr Karpal Singh had conceded on the following day of the submission that I should only confine myself to the issues as to whether the dismissal was null and void and the duty to give reasons, I take it that he has abandoned the issue relating to service of only one copy of Form 1 and the issue of lack of opportunity for mitigation before sentencing.

Duty to give reasons

Mr Karpal Singh argued that the defendants had not given any reasons for their finding. He pointed out that even the Appeal Board did not give reasons. Learned counsel then referred me to *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 which was an application for an order of certiorari to quash the decision of the Council of the respondent in dismissing the appeal from the decision of the relevant disciplinary authority. In that case the court held that since a reasoned decision from the disciplinary authority nor the University Council, which could be an additional constituent of the concept of fairness, was lacking, the applicant was entitled to succeed on this ground.

In response to this En Kamal referred me to a recent decision of the Court of Appeal in *Minister of Human Resources & Ors v National Union of Hotel, Bar and Retaurant Workers, Semenanjung Malaysia and another appeal* [1997] 3 MLJ 377 (CA) which held that the absence of reasons for a decision where there was no duty to give them could not of itself provide any support for the suggested irrationality of the decision. In so far as this case is concerned, the plaintiff was informed that he was dismissed based on the detention order.

It is my judgment that in so far as the giving of reasons is concerned so long as the General Orders concerned do not require the defendants to provide reasons there is no requirement for them to do so. I am bound by the decision of the Court of Appeal on this. One final point on the 'reasons' issue. Included in the CABD are two pages of mitigation presented by the plaintiff, relating to the whole episode. It is clear to me after reading the matters contained in the plea in mitigation, that if the plaintiff was not aware of the reasons, he would not have made such a lengthy and detailed plea in mitigation.

Plea of limitation

The plaintiff was detained on 5 August 1991. The limitation period would thus expire on 4 August 1994. Since the originating summons was filed on 25 November 1995 the defendants contended that limitation under the PAPA had set in. Section 2(a) of the PAPA provides that any action against a public authority must be commenced 'within 36 months next after the act, neglect or default complained of ...'.

In another recent decision in *Sr Katherine Lim KH v Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors* [1997] 2 MLJ 538 (CA) the question of time bar setting in against government authorities, arose. The appellant, an employee of the first respondent (that is the Ministry of

A Health, Malaysia), filed an originating summons dated 7 November 1996, praying, inter alia, for a declaration that the decision of the respondents purporting to dismiss her from her post as a nursing sister was null and void. The appellant maintained that she was away in Australia from March 1988 until 1991 doing her Master's degree. On 7 July 1988, the respondent had published a notice in the government gazette asking the appellant to report B for duty within seven days as she had left her duties without leave or without any other reasonable cause failing which she would be deemed to have been dismissed from service. A preliminary objection was raised by the respondents that the action was time barred in view of s 2(a) of the PAPA and that limitation ran from the date of the government gazette. The C appellant submitted that s 29 of the Limitation Act 1953 applied in this case and not s 2(a) of the PAPA. It was also contended by the appellant that she had to exhaust all other remedies before coming to court, and argued that time should start only when conciliation fails.

In dismissing her appeal the court held that since this matter involved a public authority, s 2(a) of the PAPA applied and time, therefore, must run D from the date of the gazette publication, namely 7 July 1988, meaning that any suit or action by the appellant against the respondents must be filed before 6 July 1991. Having filed the originating summons only on 7 November 1996, the appellant was clearly out of time by five years and four months. On this preliminary point alone, her claim failed.

E The court further held that it was not a pre-condition under any written law that the appellant had to exhaust all other administrative remedies before coming to court. She could have taken both actions, namely, to exhaust the other remedies and to file the court action simultaneously to meet the deadline provided under s 2(a) of the PAPA.

On the basis of this decision I find that the plaintiff in this case is also F caught by time bar.

In all the circumstances, I dismiss the plaintiff's application with costs.

Application dismissed.

Reported by Jafisah Jaafar

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